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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 413

UNITED STATES OF AMERICA, for the Use and Benefit of MILES LUMBER COMPANY, a Corporation,

and

MILES LUMBER COMPANY, a Missouri Corporation, in Its Individual Capacity,

Petitioners,

vs.

HARRISON AND GRIMSHAW CONSTRUCTION COMPANY, a Partnership or Joint Venture, Consisting of the Following Individuals, Partnerships, and Corporations:

Floyd Alfred Harrison, an Individual; Joe Bob Harrison, an Individual; Five Star Homes, Inc., an Oklahoma Corporation; Lake View Developers, Inc., an Oklahoma Corporation; Lorayne, Inc., an Oklahoma Corporation; Harrison Builders Supply Company, an Oklahoma Corporation; Merit Realty Company, an Oklahoma Corporation; Premium Realty Company, an Oklahoma Corporation; Floyd A. Harrison Realty Company, Inc., an Oklahoma Corporation; Country Club Developers, Inc., an Okahoma Corporation; W. R. Grimshaw Company, an Oklahoma Corporation; and W. R. Grimshaw Company, a Partnership Consisting of William Ray Grimshaw, William Ray Grimshaw, Jr., and Harry Douglas Grimshaw;

HARDY PLYWOOD AND DOOR, INC., a Corporation; TEXOMA DISTRIBUTORS, INC., a Corporation; MARSHALL WHOLESALE LUMBER COMPANY, INC., a Corporation; CARL MORRIS, an Individual Doing Business As Carl Morris Construction Company; STANDARD ACCIDENT INSURANCE COMPANY, a Corporation; NATIONAL SURETY CORPORATION, a Corporation; AETNA CASUALTY & SURETY COMPANY, a Corporation; NEW AMSTERDAM CASUALTY COMPANY, a Corporation; THE TRAVELERS INDEMNITY COMPANY, a Corporation; PAUL W. ANDERSON; NATHAN A. BURKHAM; W. G. (Bud) KILLION; MARJORIE ANDERSON; FLORINE BURKHAM; BETTY ANN KILLION; and DANIEL E. HARDY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

ROBERT B. LANGWORTHY,
Floor Three, Union National Bank Bldg.,
Kansas City 6, Missouri,
Attorney for Petitioners.

LINDE, THOMSON, VANDYKE, FAIRCHILD & LANGWORTHY.
WEARY, WEARY & SANGSTER,
Of Counsel.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners pray certiorari to review a judgment of the Court of Appeals for the 10th Circuit entered June 15, 1962.

OPINIONS BELOW.

On June 15, 1962, the United States Court of Appeals for the 10th Circuit entered its opinion written by Judge Breitenstein. A dissenting opinion was written by Judge Pickett. The appeal was from a judgment of dismissal of the United States District Court entered on October 10, 1961, dismissing the complaint and which also stated that an immediate appeal from the order and judgment should be had under 28 United States Code, § 1292. The United States Court of Appeals for the 10th Circuit had entered its order on November 3, 1961, granting leave to appeal from the portion of the order of the United States District Court which was interlocutory in character. The opinion and the dissent in the United States Court of Appeals for the 10th Circuit are reported in ____ F.2d ____ and are found in Appendix A of this Petition.

FEDERAL JURISDICTION.

The petitioner, United States of America for the Use and Benefit of Miles Lumber Company (a Missouri corporation), brought suit in the State of Kansas against a general contractor, Harrison and Grimshaw Construction

Company, various subcontractors and their sureties for materials and supplies shipped by Miles Lumber Company, a Missouri corporation, and delivered to a Capehart Housing Project at Fort Riley, Kansas. Suit was brought under the jurisdictional portion of the Miller Act, 40 United States Code, § 270. (49 Stat. 794, Aug. 24, 1935, Ch. 642)

JURISDICTION OF THE SUPREME COURT.

The judgment of the United States Court of Appeals was entered on June 15, 1962, affirming the judgment and order of the United States District Court. Jurisdiction of this Court is invoked under 28 United States Code, § 1254. (62 Stat. 928, June 25, 1948, Ch. 646)

SUMMARY OF THE MATTER INVOLVED.

Suit was brought by the United States of America on behalf of the Miles Lumber Company against a general contractor, Harrison and Grimshaw Construction Company, various subcontractors and their sureties for materials furnished by Miles Lumber Company and delivered to a Capehart Housing Project at Fort Riley, Kansas, in the year 1957. The suit was in six counts. Under Count I, suit was brought to recover the sum of $27,059.66 for materials furnished by Miles Lumber Company on the ground that the jurisdictional portion of the Miller Act, 40 United States Code, § 270 (b), [49 Stat. 794, Aug. 24, 1935, Ch. 642 (2)] applied. Suit was brought against the principal contractor Harrison and Grimshaw Construction Company (either a joint venture or a partnership) and its surety on a bond accepted by the United States under the Capehart Act. (69 Stat. 646, 70 Stat. 1019, 70 Stat. 1109, 12 U.S.C. § 1748, 42 U.S.C. 1594) A second set of defendants consisted of the immediate subcontractors to the contractor

and a third set of defendants consisted of individuals and firms who, it is alleged, were parties to the subcontracts and were themselves subcontractors. All of the defendants filed motions to dismiss or for summary judgment on the grounds that the Miller Act did not apply to housing projects constructed under the Capehart Act and that jurisdiction of suits brought on Capehart bonds could not be had under the Miller Act.

Counts II, III, IV, V, and VI were alternative counts to Count I and were suits brought by petitioner Miles Lumber Company in its individual capacity to recover the sum of $27,059.66 and jurisdiction was based upon diversity of citizenship. Motions were filed to dismiss these counts for want of proper venue and jurisdiction by defendants Paul Anderson, Marjorie Anderson and Daniel Hardy.

The United States District Court sustained the motion to dismiss Count I on the ground that the Miller Act did not apply and that jurisdiction of suits brought on Capehart bonds could not be had under the Miller Act. The lower court also sustained the Motions to dismiss Counts II, III, IV, V, and VI as to defendants Andersons and Hardy for the reason that since the Court had held that there was no jurisdiction under the Miller Act, there then could be no venue as to the three defendants under the remaining counts. Since venue and jurisdiction of Counts II, III, IV, V, and VI depend upon whether there is jurisdiction under the Miller Act, the determination of the question as to Count I determines whether the Court had erred with respect to the dismissal under Counts II, III, IV, V, and VI.

On appeal, the United States Court of Appeals for the 10th Circuit affirmed the holding of the United States District Court and held that the provisions of the Miller

Act did not apply to suits brought on a bond furnished by a contractor in connection with a military housing project under the Capehart Act and that there was no jurisdiction under the Miller Act on suits brought for materials furnished under the Capehart Act. There was a dissenting opinion.*

QUESTIONS PRESENTED.

May a suit be brought on a bond furnished by a contractor in connection with a military housing project under the Capehart Act by a supplier to a subcontractor under the jurisdictional provisions of the Miller Act, 40 U.S.C. § 270 (49 Stat. 794) (12 U.S.C. § 1748, 42 U.S.C. 1594) and is not a military housing project constructed under the Capehart Act (69 Stat. 646, 70 Stat. 1019, 70 Stat. 1109) a public work of the United States within the meaning of the Miller Act?

SPECIFICATIONS OF ERROR.

The Court of Appeals erred in holding that the Miller Act does not give jurisdiction to suits brought on a Capehart Act project bond.

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*Some suggestion is found in the Opinion of the Court of Appeals that the notice given prior to suit was insufficient unless the Miller Act applied. This is not based upon the record. The District Court dismissed the suit solely upon the ground that there was no jurisdiction under the Miller Act. There was no trial and petitioners are prepared to prove at trial that notice was properly given both under the Miller Act and under the bond. This suggestion does not mitigate against the issuance of the writ as the opinion of the Court of Appeals is based upon the ground that the Miller Act does not apply to Capehart bonds.

REASONS FOR GRANTING THE WRIT.

The opinion of the Court of Appeals for the 10th Circuit is in conflict with the decision of the Court of Appeals for the 5th Circuit (and with opinions of District Courts in other Circuits) construing the Capehart Act and the Miller Act and conflicts with the decisions of this Court holding that the Miller Act must be liberally construed to accomplish its purpose of protecting those who furnish labor and material in the performance of contractors for the construction of public works.

As is stated in the opinion of the Court of Appeals, the controlling question is whether or not "the provisions of the Miller Act, 40 U.S.C. § 270 (49 Stat 794) relating to bonds furnished to the United States by contractors engaged in the construction of Federal public works, apply to a suit brought on a bond furnished by a contractor in connection with a military housing project under the Capehart Act, 42 U.S.C. § 1594. (69 Stat. 646, 70 Stat. 1019, 70 Stat. 1109)." We submit that the opinion of the United States Court of Appeals holding that no jurisdiction is granted to suits brought on a Capehart Act bond is contrary to the provisions of the Capehart Act and the Miller Act, is contrary to the intent of Congress, as expressed in the Capehart Act, is contrary to the language of the Capehart Act itself, is contrary to decisions of other circuits, and is contrary to the opinions of this Court that the Miller Act must be liberally construed; further, the opinion too narrowly restricts the intent and provisions of the Miller Act.

1. The opinion of the lower court is directly in conflict with the opinion of the United States Court of Appeals for the 5th Circuit in the case of *Lasley* v. *United States*, (5 Cir. 1961) 285 F.2d 98, wherein that court stated:

> "we think it clear that Congress considered that but for the provisions of the Capehart Act, quoted above, a contractor would be required to supply a builder with a Miller Act bond before entering upon a Capehart construction job, because such a project falls within the language 'construction * * * of any public building of public work of the United States'; that the purpose of the bonding provisions in the Capehart Act was merely to substitute it for the bond described in 40 U.S.C.A. §270 (b) quoted above and that the remainder of the provisions of the Miller Act would apply to the Capehart Bond just as they do to a Miller Act bond. This would, of course, include the provisions conferring jurisdiction on the District Courts of the United States."

In addition to the decisions of the United States Court of Appeals for the 5th Circuit, District Courts in the United States in other circuits have held that the Miller Act and the Capehart Act must be construed together and that the Capehart Act bonds are to be treated as having been furnished in lieu of the bonds described in the Miller Act and that the provisions of the Miller Act, including the jurisdictional provisions, apply to suits brought on Capehart Act bonds. *Autrey* v. *William and Dunlap*, (W.D. La. 1960) 185 F. Supp. 802; *United States* v. *Progressive Contractors, Inc.*, (N.E., N.D. 1961) 196 F. Supp. 171; *United States ex rel. Acme Furnace Fitting Company* v. *Fort George G. Meade Defense Housing Corp.*, (D.C. Md., 1960) 186 F. Supp. 639. In this connection, it may be noted that three of the individual defendants are residents of Texas which is in the 5th Circuit. The plaintiff is a Missouri corporation and the North Dakota District Court is in the 8th Circuit which also includes the State of Missouri. It is thus clear that there is a conflict of opinions between the opinion of the Court of Appeals for the 10th Circuit in this case and the opinion of the Court of Ap-

peals for the 5th Circuit as well as a conflict with lower courts in other Circuits. While the precise point raised in the case below includes a suggestion as to the satisfaction of the notice requirements under the Miller Act as opposed to the notice requirements which might otherwise be required and appears to be somewhat different from the jurisdictional point raised in the case of *Lasley* v. *United States* (*supra*), the holding of the two cases are directly contrary to each other in that they decide that the Miller Act either does or does not apply.

2. It would seem clear that the Miller and the Capehart Acts must be construed uniformly throughout the United States and that the question presented is so important that this court should review the opinion below. This court has in the past felt that decisions involving the construction of the Miller Act are such as to call for the review by this court where the lower courts have refused to hold that the Miller Act applied. *U. S.* v. *Irwin*, 316 U.S. 23, 86 L. Ed. 1241, 62 S. Ct. 899; *U. S. ex rel. Sherman* v. *Carter*, 353 U.S. 210, 77 S. Ct. 793; *Clifford F. MacEvoy Company* v. *U. S. ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 64 S. Ct. 890. Those cases specifically express the policy that the provisions of the Miller Act are to be liberally construed to carry out its purposes while *U. S.* v. *Irwin* (*supra*) states that the Miller Act is meant to control with respect to public works as including "any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public". The question whether or not the Miller Act should apply to bonds given under the Capehart Act involves a construction of the Miller Act and this court has in the past felt that the construction of the Miller Act is sufficiently important for this court to review.

3. But not only is the construction of the Miller Act important alone but a construction of the Capehart Act together with the Miller Act is extremely important. The Capehart Act amends Title VIII, "Armed Services Housing the Mortgage Insurance" of the National Housing Act (69 Stat. 646, 70 Stat. 1109) and was to provide the most practical means of coping with a serious housing problem facing our military service. A revolving fund of some $50,000,000.00 and other funds were appropriated and authorized to be transferred for the purposes. Congress "recognized that budgetary considerations would not permit the expenditure in one or two fiscal years of the sums needed to meet the immediate total need" and accordingly provided for "the utilization of private mortgage capital to be repaid from quarters allowances of eligible service personnel". House Report No. 2363, June 15, 1956 (to accompany House Report 11742), 84 Congress, 2nd Session, U.S. Congressional News 1956, 4509, 4506. And Congress in its wisdom decided on a different method of financing the construction of the military housing than outright expenditures. Under the Act, the Federal Housing Administration insures the payment of the mortgages. Eligibility for the insurance requires that the mortgaged property be held by a mortgagor approved by the Commissioner of the F.H.A. who may regulate the capital structure and methods of operation and who also under the Act may acquire stock and interest in the mortgagor. The written contracts for the housing is with the United States of America. In this particular instance, the land was owned by the United States of America and was located in the Fort Riley Military Reservation. Each housing unit constructed was to be placed under the control of the Secretary of Defense and when the housing project is completed the capital stock of the mortgagor is transferred to the Secretary of Defense. The Secretary of Defense is

empowered to purchase land for a Capehart Project. The act states that housing units "shall be deemed to be housing facilities under the jurisdiction of the military department." Under the Act, the mortgages may be guaranteed by the Secretary of Defense. The Attorney General has held that such loan guarantees constitute valid obligations of the United States. (41 Opinions, Attorney General, October 22, 1959) The opinion by Judge Pickett in his dissent stating that "such a project is not in reality one built by a private entity with private funds at private risk", that such a project is a public work and that "in the light of the frequently expressed policy that the provisions of the Miller Act are to be liberally construed to carry out its purpose the Miller Act would apply" indicates clearly, together with the opinion of *Lasley* v. *U. S.* (*supra*), that this is a serious, important question. Further, the 1956 amendment to the Capehart Act which specifically states "the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of Section 1 of the Act of August 24, 1935" (70 Stat. 1110, 42 U.S.C. § 1594) can only mean that the bond shall be deemed a compliance with the requirement for the furnishing of a Miller Act Bond. This clearly shows that the Miller Act does apply to Capehart Act projects and that the only requirement removed from the Miller Act by the Capehart Act is the requirement for *a particular type of bond* and that the Miller Act applies except for a particular type of bond which is required.

CONCLUSION.

Consequently, in view of the conflict of opinions between the circuits, in view of the importance of the question presented and in view of the previous decisions

regarding the Miller Act and the legislative history of the Capehart Act, we respectfully submit that this petition for a writ of certiorari in this case should be granted.

Respectfully submitted,

ROBERT B. LANGWORTHY,
Floor Three Union National Bank Building,
Kansas City, Missouri,
HA 1-6388,
Attorney for Petitioner.

LINDE, THOMSON, VANDYKE, FAIRCHILD & LANGWORTHY,
WEARY, WEARY & SANGSTER,
Of Counsel.

APPENDIX A.

Opinion of the United States Court of Appeals, Tenth Circuit.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NO. 6916—JUNE TERM, 1962

(Filed United States Court of Appeals, Tenth Circuit, June 15, 1962. Robert B. Cartwright Clerk.)

UNITED STATES OF AMERICA, for the Use and Benefit of MILES LUMBER COMPANY, a corporation, and MILES LUMBER COMPANY, a corporation, in its Individual Capacity, Appellants,

v.

HARRISON AND GRIMSHAW CONSTRUCTION COMPANY, a partnership or joint venture, consisting of the following individuals, partnerships, and corporations: Floyd Alfred Harrison, an individual; Joe Bob Harrison, an individual; Five Star Homes, Inc., an Oklahoma Corporation; Lake View Developers, Inc., an Oklahoma corporation; Lorayne, Inc., an Oklahoma corporation; Harrison Builders Supply Company, an Oklahoma corporation; Merit Realty Company, an Oklahoma corporation; Premium Realty Company, an Oklahoma corporation; Floyd A. Harrison Realty Company, Inc., an Oklahoma corporation; Country Club Developers, Inc., an Oklahoma corporation; W. R. Grimshaw Company, an Oklahoma corporation; and W. R. Grimshaw Company, a partnership consisting of William Ray Grimshaw, William Ray Grim-

shaw, Jr., and Harry Douglas Grimshaw; HARDY PLYWOOD AND DOOR, INC., a corporation; TEXOMA DISTRIBUTORS, INC., a corporation; MARSHALL WHOLESALE LUMBER COMPANY, INC., a corporation; CARL MORRIS, an individual doing business as Carl Morris Construction Company; STANDARD ACCIDENT INSURANCE COMPANY, a corporation; NATIONAL SURETY CORPORATION, a corporation; AETNA CASUALTY & SURETY COMPANY, a corporation; NEW AMSTERDAM CASUALTY COMPANY, a corporation; THE TRAVELERS INDEMNITY COMPANY, a corporation; PAUL W. ANDERSON; NATHAN A. BURKHAM; W. G. (Bud) KILLION; MARJORIE ANDERSON; FLORINE BURKHAM; BETTY ANN KILLION; and DANIEL E. HARDY, Appellees.

Appeal from the United States District Court for the District of Kansas

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Robert B. Langworthy (Billy S. Sparks, Weary, Weary & Sangster, and Linde, Thomson, Van Dyke, Fairchild & Langworthy were with him on the brief) for Appellants.

Remington Rogers and F. Philip Kirwan (Rogers & Litchfield, Cantrell, Douglass, Thompson & Wilson, and Margolin & Kirwan were with them on the brief) for Appellees Harrison & Grimshaw Construction Company, Standard Accident Insurance Company, National Surety Corporation, Aetna Casualty & Surety Company, New Amsterdam Casualty Company, and The Travelers Company.

Paul W. Anderson, William Hergenreter, and Garlinghouse, Shaw & Hergenreter submitted a brief on behalf

of Appellees Paul W. Anderson and Marjorie Anderson.
No appearance for any other appellee.

Before PICKETT, LEWIS, and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

The issue is whether the provisions of the Miller Act, 40 U.S.C. §§ 270a and 270b, relating to bonds furnished to the United States by contractors engaged in the construction of federal public works, apply to a suit brought on a bond furnished by a contractor in connection with a military housing project under the Capehart Act.[1] If the Miller Act controls the notice given prior to suit was sufficient whereas if it does not, that notice was insufficient. The trial court denied the applicability of the Miller Act on the ground that a Capehart Act project was not a public work of the United States and dismissed the first of the 6 counts in the complaint. In so doing the court made the findings required for an interlocutory appeal under 28 U.S.C. § 1292(b) and we allowed the appeal.

Miles Lumber Company (Miles) claims $27,059.66 for lumber furnished to subcontractors on a military housing project at Fort Riley, Kansas, and sues on the prime contractor's payment bond to recover that amount.

The Capehart Act amends Title VIII, "Armed Services Housing Mortgage Insurance," of the National Housing

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1. See 42 U.S.C. §1594 as amended in 1956, 70 Stat. 1109-1110.

Act.[2] The purpose of the amendments was to provide "the most practicable means of coping with the very serious housing problem * * * facing our military services." While conceding the advantages of the use of appropriated funds, Congress "recognized that budgetary considerations would not permit the expenditure in 1 or 2 fiscal years of the sums needed," and accordingly provided for "the utilization of private mortgage capital to be repaid from quarters allowances of eligible service personnel."[3]

The statutory plan calls for construction by private entities with private funds advanced on the security of mortgages covering the housing to be constructed. The Federal Housing Administration insures the payment of the mortgages. Eligibility for such insurance requires that the mortgaged property be held by a mortgagor approved by the Commissioner of the Housing Administration who may regulate the capital structure and methods of operation and may acquire, for not more than $100, stock or interest in the mortgagor.[4]

Each housing unit is placed under the control of the Secretary of Defense "as soon as the unit is available for occupancy as determined by the Commissioner" and when the housing project is completed, the capital stock of the mortgagor, except that held by the Commissioner, is transferred to the Secretary of Defense,[5] who uses ap-

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2. 69 Stat. 646 and 70 Stat. 1109. The pertinent provisions are found at 12 U.S.C. §§1748a-1748i and 42 U.S.C. §§1594, 1594a-1594g.

3. House Report No. 2363, June 15, 1956 [To accompany H.R. 11742], 84th Congress, 2d Session, 3 U.S. Cong. News '56 4509, 4546.

4. 12 U.S.C. §1748b(b)(1).

5. 42 U.S.C. §1594(a).

propriations for quarters allowances to pay the mortgage.

In the situation here presented the mortgagor-builder was Fort Riley C-1 Housing, Inc., a Kansas corporation, and the mortgagee-lender was the First National Bank and Trust Company of Tulsa, Oklahoma. The prime contractor was Harrison and Grimshaw Construction Company. A contract was made with the Department of the Army but that contract appears nowhere in the record and we are not advised of its terms.

A payment bond, executed in the amount of $3,542,050 by the prime contractor and four corporate sureties, was accepted by the United States. The bond named as obligees the mortgagor-builder and the mortgagee-lender. Its condition is prompt payment to claimants for labor and material furnished. A prerequisite to suit on the bond is notice to any two of the following, "the principal, any one of the Obligees, or the Sureties above named" before the expiration of 90 days after the performance of the last work or the supplying of the last material or before the expiration of the time for filing a lien under state law. The bond provides that "either the giving of notice, or the filing of lien, in accordance with the pertinent lien law of the place where the project is located is a sufficient notice." Miles did not give the notice required by the bond.

The Miller Act provides that in order for a supplier of labor and material to a subcontractor to recover in a suit on a payment bond given by a prime contractor that supplier shall give notice of nonpayment to the prime contractor before the expiration of 90 days from the date on which the last labor was performed on, or ma-

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6. 42 U.S.C. §1594b.

terials furnished to, the project by him. Miles satisfied this requirement.

If a Capehart Act military housing project is not "a public building or public work of the United States"[7] the Miller Act does not apply. There is no statutory definition of that phrase. In *Title Guaranty & Trust Company of Scranton, Pennsylvania*, v. *Crane Company*, 219 U.S. 24, 33, the Supreme Court said that a work is public "if it belongs to the representative of the public."[8] *United States* v. *Ansonia Brass and Copper Company*, 218 U.S. 452, involved the relative rights of the United States and lien claimants on three vessels. As to two vessels, the construction contracts for which contained no provision for the passing of title to the United States on partial payments, the court upheld liens under state law for labor performed and materials furnished. The contract for the third vessel provided for passage of title to the United States on partial payment and the private liens were rejected. A claim that suppliers of materials to a contractor engaged in building mail truck bodies for the United States could recover under the Heard Act,[9] predecessor of the Miller Act, was rejected in *United States* v. *Metropolitan Body Co.*, 2 Cir., 79 F.2d 177, 178, the court saying that the "mail truck bodies were at the risk of the builder and were its property during all the time they were being built."

The authorities cited by Miles to sustain its claim that the Capehart Act project was a public work are not convincing. *United States* v. *Irwin*, 316 U.S. 23, 30, held that a library built with federal funds under the authoriza-

7. 40 U.S.C. §270a(a).

8. See also *Ellis* v. *United States*, 206 U.S. 246, 259.

9. 28 Stat. 278 as amended 33 Stat. 811.

tion contained in the National Industrial Recovery Act was a public work within the meaning of the Miller Act but that holding was based on language appearing in the National Industrial Recovery Act. *Lasley* v. *United States*, 5 Cir., 285 F.2d 98; *United States* v. *Ft. George G. Meade Defense Housing Corporation No. 1*, D.C. Md., 186 F. Supp. 639; and *Autrey* v. *Williams & Dunlap*, D.C. W.D. La., 185 F. Supp. 802, all involved federal court jurisdiction and we see no jurisdictional problem here as the bond in suit was executed under a law of the United States.[10] *United States* v. *Phoenix Assurance Company of New York*, D.C. N.D. Calif., 163 F. Supp. 713, is distinguishable from the instant case on its facts. In *United States* v. *Progressive Contractors, Inc.*, D.C. N. Dak., 196 F. Supp. 171, the court held that the notice provisions of the Miller Act control over the notice provisions of a Capehart Act bond but the decision makes no analysis of the problem and relies on cases of doubtful pertinence.

We are confronted here with a situation in which the project is built by a private entity with private funds at private risk. The property is encumbered by a mortgage given by a private mortgagor to a private mortgagee. Those furnishing labor and materials during project construction may assert liens under state law against the property.[11] The eventuality that title will vest in the United States does not make the project a public work. In *Armstrong* v. *United States*, 364 U.S. 40, 42, the issue was the right of material suppliers to recover on account of liens on boats built for the United States. Upon the default of the contractor the United States exercised a

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10. See 28 U.S.C. §1352 and *Adams* v. *Greeson*, 10 Cir., 300 F.2d 555, 557.

11. The bond in suit expressly recognizes such lien liability. See *United States* v. *Ansonia Brass and Copper Company* and *United States* v. *Metropolitan Body Co.*, both *supra*.

contract option and took over the uncompleted boats. The material suppliers claimed a lien under Maine law. Their claim was rejected by the Court of Claims on the ground that the construction contract contemplated that title would eventually vest in the United States and hence the United States had "inchoate title" to the materials rendering them public works immune from lien. The Supreme Court reversed saying:

> "We cannot agree that a mere prospect that property will later be owned by the United States renders that property immune from otherwise valid liens.
>
> "The sovereign's immunity against materialmen's liens has never been extended beyond property actually owned by it."

In the case at bar the materials were furnished during construction and while the record does not show when, if ever, the housing was taken over by the Secretary or the stock in the mortgagor-builder transferred to him, the statute requires such assumption of control only after completion. Under the principles stated in Armstrong the housing project was a private enterprise and not a public work when the materials were furnished. In such circumstances the Miller Act does not apply.

The seriousness of the problem compels us to pursue the question further. We are convinced that in any event Congress did not intend that the Capehart Act performance and payment bonds, and suits thereon, should be governed by the Miller Act.

The Capehart Act as passed in 1955 contained no provision for a bond. This was added by a 1956 amendment which reads:[12]

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12. 70 Stat. 1110, §507. See 42 U.S.C. §1594.

> "Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defence, or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 1 of the Act of August 24, 1935 (49 Stat. 793) [Miller Act], and no additional bonds shall be required under such section."

By this amendment Congress recognized the peculiar characteristics of a Capehart Act military housing project. Congress provided for performance and payment bonds with sureties satisfactory to the government and said that the furnishing of such bonds was a sufficient compliance with the Miller Act. It did not say that the provisions of the Miller Act apply to such bonds.

Miles contends that Capehart Act projects are public works within the ambit of the Miller Act and says, in effect, that Congress so recognized by the provision of the 1956 amendment that the furnishing of the bonds there required "shall be deemed a sufficient compliance" with §1 of the Miller Act. The theory is that there is no need for compliance if the Miller Act does not apply, and, hence, the mention of compliance presupposes that Capehart Act projects are public works.

In our opinion the conclusion does not follow. Congress realized the unusual situation created by the Capehart Act. The projects are of a private nature until completion and assumption of control by the government. The mortgagor-builder has a contract with a construction company to build the project. The constructor looks to the mortgagor-builder for payment for his work and owes to the mortgagor-builder the obligation to perform. The ownership of $100 worth of stock of the mortgagor-builder

by the Commissioner[13], does not make the United States either the owner or the paymaster. A rational approach to the problem requires that an obligee in the performance bond be the entity which owns the project and is in a position to enforce the construction contract.

Contemporaneous administrative construction aids us in the resolution of any doubts as to the congressional intent. Less than a month after the 1956 amendment became law, the Federal Housing Administration adopted the regulation found at 24 C.F.R. §292a.27 which, under the heading "Armed Services Housing Insurance; Eligibility Requirements of Mortgage," reads:

> "Assurance for the completion of a project shall be a performance bond and a payment bond satisfactory to the Commissioner and the Secretary of Defense or his designee with the mortgagor and mortgagee as joint obligees."

The naming of the mortgagor and mortgagee as joint obligees is a significant departure from a Miller Act bond in which the obligee is the United States[13a] and points up the private nature of the project.

Further administrative actions emphasize the differences between a Capehart Act bond and a Miller Act bond. The bond in suit is written on "FHA Form No. 2452 CP" and was accepted by the United States. The penal sum is $3,542,050 in spite of the fact that under

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13. 12 U.S.C. §1748b(b)(1).

13a. 40 U.S.C. §270a provides that the contractor "shall furnish to the United States" the required bond and §270b requires that a suit for non-payment of labor and material claims asserted in an action on a payment bond shall be brought "in the name of the United States." See *United States* v. *Carter*, 353 U.S. 210, and *Clifford F. MacEvoy Co.* v. *United States*, 322 U.S. 102, 105, note 4.

the Miller Act the maximum payment bond required is $2,500,000.[14] The Miller Act was intended to protect labor and material suppliers on public works by providing a substitute for the remedies existing under state mechanics lien laws applying to private works.[15] The Capehart Act bond in issue specifically recognizes the possibility of a lien for labor and materials under the law of the place where the project is constructed. Under the Miller Act notice of a claim by a supplier of labor or material to a sub-contractor need be given only to the prime contractor.[16] The bond before us requires notice to two of its parties.[17]

These variations from the Miller Act establish that those charged with the administration of the Capehart Act construed the 1956 amendment as providing for a bond other than and different from the bonds required by the Miller Act. Such interpretations made almost contemporaneously with statute enactment by men charged "with the responsibility of setting its machinery in motion" are entitled to great weight.[18]

We are aware of the rule that the Miller Act is to be liberally construed to accomplish its purpose of protecting those who furnish labor and material in the performance of contracts for the construction of public

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14. 40 U.S.C. §270a(a)(2).

15. *United States* v. *Carter*, *supra*, at 216; *Arthur N. Olive Co., Inc.*, v. *United States*, 1 Cir., 297 F.2d 70; *United States* v. *Harman*, 4 Cir., 192 F.2d 999, 1000.

16. 40 U.S.C. §270b(a).

17. The more intricate financing arrangements prescribed in Capehart Act projects justifies the requirement of dual notice.

18. *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 549.

works,[19] but that rule has no application here. We are concerned with a Capehart Act project bond and we are convinced that the Miller Act has no application to such a bond. The notice provisions of the bond govern. As these were not satisfied, Count 1 of the complaint states no claim and the judgment of dismissal was proper.

One point remains for disposition. Three of the defendants, Paul W. Anderson, Marjorie Anderson, and Daniel E. Hardy, were served outside of the State of Kansas. The trial court dismissed the entire case as to them and entered an appealable judgment under Rule 54(b), F.R.Civ.P., Rule 4(f), F.R.Civ.P., limits the effective service of process other than subpoena to the territorial limits of the state in which the district court is held unless a federal statute permits extraterritorial service. As the action may not be maintained under the Miller Act rule that in suits under that Act there may be extraterritorial service of process[20] does not apply. Hence, there is no basis for service outside of Kansas and no valid process submitting the three named defendants to the jurisdiction of the United States District Court for the District of Kansas.

Affirmed.

PICKETT, Dissenting.

I cannot agree that a housing project constructed under the provisions of the Capehart Act[1] is not a public

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19. *Fanderlik-Locke Co. v. United States*, 10 Cir., 285 F.2d 939, 942, certiorari denied 365 U.S. 860.

20. *Limerick v. T. F. Scholes, Inc.*, 10 Cir., 292 F.2d 195, 196.

1. Housing Amendments of 1955, §403 *et seq.*, 69 Stat. 651 (1955), as amended 42 U.S.C.A. §1594.

work of the United States within the meaning of the Miller Act.[2] If the contract for the housing project in this instance had been entered into between the United States and Harrison and Grimshaw Construction Company, and payment for the project had been made from appropriated funds, no one would question the applicability of the Miller Act. *Lasley* v. *United States ex rel. Westerman*, 5 Cir., 285 F.2d 96; *Gypsum Contractors, Inc.* v. *American Surety Co.*, ___ N.J. ___, (May 7, 1962). Because funds were not currently available, the financing technique set forth in the Capehart Act was devised to permit the United States to acquire housing for members of its armed services on the installment plan, and the Act contemplates that the United States will be a party to any contract for the construction of housing pursuant to its provisions. The houses are to be built on land owned by the United States, and title to the houses passes to the United States as they are completed. Stripped of its formalism, the arrangement is simply one whereby the United States is able to finance the construction of housing projects through loans obtained by its prime contractor, which the United States is obligated to repay. Such a project is not in reality one built by a private entity with private funds at private risk. In the light of the frequently expressed policy that the provisions of the Miller Act are to be liberally construed to carry out its purpose,[3] the Miller Act would apply absent any requirement for bonds in the Capehart Act.

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2. 49 Stat. 793 (1935), 40 U.S.C.A. §270.

3. *E. g. United States ex rel. Sherman* v. *Carter*, 353 U.S. 210; *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102; *T. F. Scholes, Inc.*, v. *United States ex rel. H. W. Moore Equip. Co.*, 10 Cir., 295 F.2d 366; *Limerick* v. *T. F. Scholes, Inc.*, 10 Cir., 292 F.2d 195; *Fanderlik-Locke Co.* v. *United States ex rel. Morgan*, 10 Cir., 285 F.2d 939, cert. denied 365 U.S. 860.

The majority opinion cites *Armstrong* v. *United States*, 364 U.S. 40, for the proposition that these housing projects are not public works and are therefore subject to local lien law. In that same case the Supreme Court also holds that once title to the property has passed to the United States the liens cannot be enforced. I am convinced that when the Capehart units pass into the control of the Secretary of Defense that there is not such a taking as would entitle the materialmen or laborers to be compensated for their property which, according to the Armstrong case, amounts to a lien. This, of course, simply emphasizes the necessity for requiring payment bonds for such housing projects, and the distinctive bond visualized by the majority opinion would certainly fit the demands of public policy.

The key to this problem lies in the 1956 amendment to the Capehart Act,[4] which is quoted in the majority opinion, and specifically in the phrase "the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 1 of the Act of August 24, 1935 * * *." The majority read this language as excusing the furnishing of Miller Act bonds for Capehart Act projects, and this then leads them to conclude that Congress clearly intended that the provisions of the Miller Act would not apply to Capehart Act projects. Conceding that the statutory language is inartful, and it has not been explained in the legislative history, but considering all of the circumstances, I think that the cases which hold that the two statutes are to be considered in pari materia, and that the bonds described in the 1956 amendment to the Capehart Act are to be treated as having been furnished in lieu of the bonds described in Section 1 of the Miller

4. Housing Act of 1956, Section 507, 70 Stat. 1110 (1956).

Act, are correct. *Lasley* v. *United States, supra; United States ex rel. Robertson Lumber Co.* v. *Progressive Contractors, Inc.*, D.N.D., 196 F. Supp. 171; *United States ex rel. Acme Furnace Fitting Co. v. Ft. George G. Meade Defense Housing Corp. No. 1*, D. Md., 186 F. Supp. 639; *Autrey* v. *Williams and Dunlap*, W.D. La., 185 F. Supp. 802; *Gypsum Contractors, Inc.*, v. *American Surety Co., supra.* The majority state that these cases were concerned only with whether federal jurisdiction existed, but such an interpretation fails to accord them their full significance since on this point what is said is in direct conflict with the conclusion of the Court of Appeals for the Fifth Circuit in *Lasley* v. *United States, supra*, and the views of the district courts in the other cases cited.[5] I am certain that the view adopted in those decisions accords to the statutory language its most logical interpretation. It follows that the provisions of Section 2 of the Miller Act, 40 U.S.C.A. §270(b), including the notice requirement, should be read into the bond.[6]

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5. The court in *Lasley* v. *United States*, 285 F.2d 98, 100, said:

> "Appellants' argument is plausible, but we are not persuaded by it. We think it clear that Congress considered that but for the provisions of the Capehart Act, quoted above, the contractor would be required to supply a builder with a Miller Act bond before entering upon a Capehart construction job, because such a project falls within the language 'construction * * * of any public building or public work of the United States;' that the purpose of the bonding provisions in the Capehart Act was merely to substitute it for the bond described in 40 U.S.C.A. §270b(b), quoted above, and that the remainder of the provisions of the Miller Act would apply to the Capehart bond just as they do to a Miller Act bond. This would, of course, include the provisions conferring jurisdiction on the district courts of the United States.

6. Cf. *People* v. *Metropolitan Surety Co.*, 211 N.Y. 107, 105 N.E. 99; 11 C.J.S., Bonds, §40(e) (1938); 91 C.J.S., United States, §107 (1955). See, *e. g.*, *Scott* v. *Kansas W. Pipe Line Co.*, 158 Kan.

The administrative form for bonds apparently furnished for Capehart Act construction is not that contemplated by the Miller Act. If this is to be considered as an administrative interpretation that the Miller Act was not applicable, then I think the interpretation was wrong. There could be no purpose or reason for Congress to state that the furnishing of a bond should be deemed a sufficient compliance with the provisions of Section 1 of the Miller Act if it was not intended that the bond furnished would be considered a Miller Act bond from that point forward.

For the reasons stated, I would reverse the judgment.

160, 146 P.2d 366; *Petition of Leon Keyser, Inc.*, 97 N.H. 404, 89 A.2d 917; *Philip Carey Mfg. Co.* v. *Peerless Cas. Co.*, 330 Mass. 319, 113 N.E.2d 226; *United Tile Co.* v. *Kermit Independent School Dist.*, Tex. Civ. App., 273 S.W.2d 434; Annos. 77 A.L.R. 21, 47 and 166 (1932), 89 A.L.R. 446 (1934), and 118 A.L.R. 57 (1939).

APPENDIX B.

Miller Act.

Title 40, U.S.C., § 270.

§270a. Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country.

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than

$5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section. (Aug. 24, 1935, ch. 642, § 1, 49 Stat. 793.)

§270b. Same; rights of persons furnishing labor or material.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a

right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law, to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit. (Aug. 24, 1935, ch. 642, § 2, 49 Stat. 794.)

§ 270c. Same; right of person furnishing labor or material to copy of bond.

The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a

certified copy of such bond and the contract for which it was given, which copy shall be *prima facie* evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof. (Aug. 24, 1935, ch. 642, § 3, 49 Stat. 794.)

§270d. Same; definition of "person".

The term "person" and the masculine pronoun as used in sections 270a—270c of this title shall include all persons whether individuals, associations, copartnerships, or corporations. (Aug. 24, 1935, ch. 642, § 4, 49 Stat. 794.)

§ 270e. Same; waiver of sections 270a—270d with respect to Army, Navy, Air Force, or Coast Guard contracts.

The Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Treasury may waive sections 270a—270d of this title respect to cost-plus-a-fixed fee and other cost-type contracts for the construction, alteration, or repair of any public building or public work of the United States and with respect to contracts for the manufacturing, producing, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, munitions, materiel, or supplies of any kind or nature for the Army, Navy, Air Force, or Coast Guard, respectively, regardless of the terms of such contracts as to payment or title. (Apr. 29, 1941, ch. 81, 55 Stat. 147; June 3, 1955, ch. 129, 69 Stat. 83.)

APPENDIX C.

Capehart Act.

Title 40, U.S. Code, § 1594.*

Subchapter XI—Housing for Military Personnel.

§ 1594. Contracts for construction.

(a) Contract provisions; competitive bids.

The Secretary of Defense or his designee is authorized to enter into contracts with any eligible bidder to provide for the construction of urgently needed housing on lands owned or leased by the United States and situated on or near a military reservation or installation for the purpose of providing suitable living accomodations for military personnel of the armed services assigned to duty at the military installation at or in the area where the housing is situated. Any such contract shall provide that each housing unit in the project shall be placed under the control of the Secretary of Defense, or his designee, as soon as the unit is available for occupancy as determined by the Commissioner. Any such contract shall also provide that, except for stock held by the Commissioner, the capital stock of the mortgagor (where the mortgagor is a corporation) be transferred to the Secretary of Defense, or his designee, when the housing has been completed as determined by the Commissioner. Any such contract shall contain such terms and conditions as the Secretary may determine to be necessary to pro-

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*The sales made by the use plaintiff were made in October, November and December, 1957. Title 40, U.S.C., Sec. 1594, has been amended several times since. It would appear that the amendments are not material to the particular issues involved in this case.

tect the interests of the United States. Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 270a of Title 40, and no additional bonds shall be required under such section. Before the secretary shall enter into any contract as authorized by this section for the construction of housing, he shall invite the submission of competitive bids after advertising in the manner prescribed in section 152 of Title 41.

(b) Definition of "eligible bidder."

For the purposes of this subchapter, the term "eligible bidder" means a person, partnership, firm, or corporation determined by the Secretary after consultation with the Commissioner (1) to be qualified by experience and financial responsibility to construct housing of the type described in subsection (a) of this section, and (2) to have submitted the lowest acceptable bid.

(c) Acquisition of capital stock of property covered by mortgage.

Notwithstanding any other provision of law, the Secretary of Defense or his designee is authorized to acquire the capital stock of mortgagors holding property covered by a mortgage insured under sections 1748—1748g and 1748h-1 of Title 12, and to exercise the rights as holder of such capital stock during the life of such mortgage and, upon the termination of the mortgage, to dissolve the corporation; to guarantee the payment of notes or other legal instruments required by the Commissioner of such mortgagors; to make payments thereon;

and to guarantee and indemnify the Armed Services Housing Mortgage Insurance Fund against loss in cases where so required. All housing facilities placed under the control of the Secretary of Defense pursuant to the provisions of this subchapter shall be deemed to be housing facilities under the jurisdiction of the military department to which they are assigned. (Aug. 11, 1955, ch. 783, title IV, § 403, 69 Stat. 651; Aug. 7, 1956, ch. 1029, title V, § § 506 (b)—(d), 507, 70 Stat. 1110.)

§ 1594a. Acquisition of land or housing financed under Armed Services Housing Mortgage Insurance Fund.

(a) Purchase price.

Whenever the Secretary of Defense or his designee deems it necessary for the purpose of this subchapter, he may acquire by purchase, donation, condemnation, or other means of transfer, any land or (with the approval of the Federal Housing Commissioner) any housing financed with mortgages insured under the provisions of sections 1748—1748h of Title 12 as in effect prior to August 11, 1955. The purchase price of any such housing shall not exceed the Federal Housing Commissioner's estimate of the replacement cost of such housing and related property (not including the value of any improvements installed or constructed with appropriated funds) as of the date of final endorsement for mortgage insurance reduced by an appropriate allowance representing the estimated cost of repairs and replacements necessary to restore the property to sound physical condition, as determined by the Secretary of Defense or his designee upon the advice of the Commissioner: *Provided*, That in any case where the Secretary or his designee acquires a project held by the Commissioner, the price paid shall not exceed the face value of the debentures (plus accrued

interest thereon) which the Commissioner issued in acquiring such project.

(b) Housing at or near a military installation.

Notwithstanding any provision of subsection (a) of this section to the contrary, the Secretary of Defense or his designee shall, in the manner provided in subsection (a) of this section, acquire by purchase, donation, or other means of transfer or, if the parties cannot agree upon terms for acquisition by such means, by condemnation, any housing constructed under the mortgage insurance provisions of sections 1748—1748h of Title 12 (as in effect prior to August 11, 1955) which is located at or near a military installation where the construction of housing under the Armed Services Housing Mortgage Insurance Program has been approved by the Secretary.

(c) Condemnation; procedures; deposit; payment; interest.

(1) Condemnation proceedings instituted pursuant to this section shall be conducted in accordance with the provisions of section 257 of Title 40, or any other applicable Federal statute. Before any such condemnation proceedings are instituted, an effort shall be made to acquire the property involved by negotiation. In any such condemnation proceedings, and in the interests of expedition, the issue of just compensation may be determined by a commission of three qualified, disinterested persons to be appointed by the court. Any commission appointed hereunder shall give full consideration to all elements of value in accordance with existing law, and shall have the powers of a master provided in subdivision (c) of rule 53 of the Federal Rules of Civil Procedure and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of such rule. Its

action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice prescribed in paragraph (2) of subdivision (e) of such rule. Trial of all issues, other than just compensation, shall be by the court.

(2) In any condemnation proceedings instituted pursuant to this section, the court shall not order the party in possession to surrender possession in advance of final judgment unless a declaration of taking has been filed, and a deposit of the amount estimated to be just compensation has been made, under section 258a of Title 40, providing for such declar tions. Unless title is in dispute, the court, upon application, shall promptly pay to the owner at least 75 per centum of the amount so deposited, but such payment shall be made without prejudice to any party to the proceeding. In the event that condemnation proceedings are instituted in accordance with procedures under sections 258a—258e of Title 40, the court shall order that the amount deposited shall be paid in a lump sum or over a period not exceeding five years in accordance with stipulations executed by the parties in the proceedings. In connection with condemnation proceedings which do not utilize the procedures under such sections, the Secretary or his designee, after final judgment of the court, may pay or agree to pay in a lump sum or, in accordance with stipulations executed by the parties to the proceedings, over a period not exceeding five years the difference between the outstanding principal obligation, plus accrued interest, and the price for the property fixed by the court. Unless such payment is made in a lump sum, the unpaid balance thereof shall bear interest at the rate of 4 per centum per annum.

(d) Occupancy; use, or improvement of property before approval of title.

Property acquired under this section may be occupied, used, and improved for the purposes of this section prior to the approval of title by the Attorney General as required by section 255 of Title 40.

(e) Release of accrual requirements for replacement, taxes, and hazard insurance reserves.

The Secretary or his designee may, in the case of any housing acquired or to be acquired under this section, make arrangements with the mortgagee whereby such mortgagee will agree to release and waive all requirements of accruals for reserves for replacement, taxes, and hazard insurance provided for under the corporate charter and indenture agreement with respect to such housing, upon the execution of a written agreement by the Secretary or his designee that the purposes for which such reserves and other funds were accrued will be carried out.

(f) Use as public quarters or lease of housing; deposit of amounts and rental charges.

Any housing acquired under this section may be (1) assigned as public quarters to military personnel and their dependents; or (2) leased to military and civilian personnel for occupancy by them and their dependents, upon such terms and conditions as will in the judgment of the Secretary of Defense or his designee be in the best interest of the United States, without loss to military personnel of their basic allowance for quarters or appropriate allotments. Amounts equal to the quarters allowances or appropriate allotments of military personnel to whom such housing is assigned as public quarters under clause (1), and the rental charges realized under clause

(2), shall be deposited in the revolving fund created by subsection (g) of this section.

(g) Creation of revolving fund; purpose; deposits.

There is created a fund which shall be used by the Secretary of Defense or his designee as a revolving fund for the purpose of paying for housing and related property acquired under this section, paying interest, principal, mortgage insurance premiums, and other obligations (except those for maintenance and operation) with respect to such housing, and paying expenses incurred in the alteration, improvement, rehabilitation, and repair of such housing. The amounts and charges referred to in the last sentence of subsection (f) of this section, and any savings realized in the operation of section 1594b of this title, shall be deposited in such fund. For the purposes of the preceding sentence, the term "savings realized in the operation of section 1594b of this title" means the difference between the amount made available for payments under section 1594b of this title and the amount actually used in making such payments.

(h) Capital for revolving fund.

The Secretary of the Treasury is authorized and directed to establish on the books of the Treasury Department the revolving fund created pursuant to the authority of this section. To provide capital for such fund, there is authorized to be appropriated a sum not to exceed $50,000,000 and the Secretary of Defense, with the approval of the President, is authorized to transfer from unexpected balances of any appropriations of the military departments not carried to the surplus fund of the Treasury such sums as may be determined by the Secretary of Defense to be necessary to provide adequate capital

for the revolving fund. (Aug. 11, 1955, ch. 783, title IV, § 404, 69 Stat. 652; Aug. 3, 1956, ch. 939, title IV, § 420, 70 Stat. 1019; Aug. 7, 1956, ch. 1029, title V, § 512, 70 Stat. 1111; July 12, 1957, Pub. L. 85-104, title V, § 504, 71 Stat. 303; Aug. 20, 1958, Pub. L. 85-685, title V, § 513 (d), 72 Stat. 663.)

§ 1594b. Maintenance and operation of housing; use of quarters; payment of principal, interest, and other obligations.

The Secretary of Defense or his designee is authorized to maintain and operate any housing acquired under this subchapter and assign quarters therein to military and civilian personnel and their dependents. Appropriations for quarters allowances or appropriate allotments, and rental charges to civilian personnel, may be utilized by the military department concerned for the payment of principal, interest, and other obligations, except those of maintenance and operation, of the mortgagor corporation with respect to such housing projects. Such payments shall not exceed an average of $90 a month per housing unit and total payments for all housing so acquired shall not exceed $21,000,000 per month: *Provided*, That, in case of the United States Coast Guard, total payments for all housing so acquired shall not exceed $90,000 per month. (Aug. 11, 1955, ch. 783, title IV, § 405, 69 Stat. 653; Aug. 7, 1956, ch. 1029, title V, § 508, 70 Stat. 1110.)

§ 1594c. Services of architects and engineers; use of appropriations; acquisition of sites.

Whenever the Secretary of Defense or his designee determines that it is desirable in order to effectuate the purposes of this subchapter, the Secretary is authorized, without regard to the civil service and classification laws,

to procure, by negotiation or otherwise, the services of architects and engineers, or organizations thereof, under such arrangements as he deems desirable, but at an expense not in excess of that permissible under the schedule of fees allowed from time to time by the Public Housing Administration in connection with projects assisted under the United States Housing Act of 1937, as amended. Such services may include the development of plans, drawings, and specifications for family housing under this subchapter and other services in connection therewith: *Provided*, That such plans, drawings, and specifications may include the use on any project to be constructed under this subchapter of alternate materials or alternate types of construction, including prefabrication, that provide substantially equal value and conform to standards established by the Federal Housing Commissioner: *Provided further*, That such plans, drawings, and specifications when developed pursuant to arrangements made under this section after August 7, 1956, shall follow the principle of modular measure, in order that the housing may be built by conventional construction, on-site fabrication, factory precutting, factory fabrication, or any combination of these construction methods: *Provided further*, That the Secretary may designate certain sites or parts thereof for family housing to be furnished from prefabricated houses or housing components. Such arrangements may include provision for advance or progress payments, for payment by third parties, for payment by the Government of any such compensation as is not paid for by third parties, and shall include provision for reimbursement by third parties to the Government of any compensation or other expenses paid by the Government pursuant to this section, and may include other provisions for compensation. Any public works appropriations

now or hereafter available to the Departments of the Army, Navy, or Air Force or the Coast Guard may be obligated by the respective departments or the Coast Guard for these purposes. Reimbursements to the Government on account of payments made pursuant to this section shall be made to appropriations against which such payments were charged. The Secretary is further authorized to advance or pay to the Federal Housing Administration its "Appraisal and Eligibility Statement" fees in connection with such family housing. The Secretary is further anthorized to enter into arrangements by contract or otherwise for eventual acquisition by the Government, without cost to the Government of all right, title, and interest in sites on which housing is constructed pursuant to this subchapter and improvements thereon. (Aug. 11, 1955, ch. 783, title IV, § 406, 69 Stat. 653; Aug. 7, 1956, ch. 1029, title V, § 509, 70 Stat. 1110.)

§ 1594d. Appropriations; use of quarters allowances.

(a) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of sections 1594—1594c of this title.

(b) Any funds heretofore or hereafter authorized to be expended by any of the military departments or the Coast Guard for the payment of allowances for quarters for military personnel may be used for the purposes specified in subsection (a) of this section. (Aug. 11, 1955, ch. 783, title IV, § 407, 69 Stat. 653.)

§ 1594e. Definitions.

(a) Wherever the terms "Secretary of Defense" or "Secretary" or "Secretary of the Army, Navy, or Air Force" appear in this subchapter or in sections 1748—1748g and 1748h-1 of Title 12, they shall be deemed to mean the

Secretary of the Treasury in the case of the application of the provisions of this sub-chapter or of section 1748—1748g and 1748h-1 of Title 12, for the benefit of the United States Coast Guard.

(b) Wherever the term "armed services" appears in this subchapter it shall be deemed to include the United States Coast Guard. (Aug. 11, 1955, ch. 783, title IV, § 409, 69 Stat. 654.)

§ 1594f. Net floor area limitations.

In the construction of housing under the authority of this subchapter and sections 1748—1748g and 1748h-1 of Title 12, the maximum limitations on net floor area for each unit shall be the same as the net floor area limitations prescribed by law (at the time plans and specifications for such construction are begun) for public quarters built with appropriated funds under military construction authority. (Aug. 11, 1955, ch. 783, title IV, § 410, as added Aug. 7, 1956, ch. 1029, title V, § 510, 70 Stat. 1110, and amended July 12, 1957, Pub. L. 85-104, title V, § 503, 71 Stat. 303.)

§ 1594h. Purchase of family housing for assignment as public quarters; space and cost limitations.

The Secretary of the Army is authorized to purchase out of appropriations available for military construction family housing including necessary land at, or near, military tactical installations for assignment as public quarters to military personnel and their dependents. Not more than 300 units of such housing may be purchased under this section. Space limitations per unit will be in accordance with subsections (a), (b), and (c) of section 4774 of Title 10, and cost limitations as now or hereafter established for military housing constructed with appropriated

funds. (Pub. L. 85-241, title I, § 103, Aug. 30, 1957, 71 Stat. 534.)

§ 1594i. Authorization of number of family housing units.

Notwithstanding the provisions of any other law, and effective July 1, 1958, no family housing units shall be contracted for or acquired at or in support of military installations or activities unless the actual number of units involved has been specifically authorized by an annual military construction authorization Act except (1) housing units acquired pursuant to the provisions of section 1594a of this title (2) housing units leased, utilizing availablle operation and maintenance appropriations, for terms of one year, whether renewable or not, or for terms of not more than five years pursuant to the provisions of section 171z-3 of Title 5. (Pub. L. 85-241, title IV, § 406 (a), Aug. 30, 1957, 71 Stat. 556; Pub. L. 85-685, title V, § 512, Aug. 20, 1958, 72 Stat. 662.)

§ 1594j. Inadequate quarters.

(a) Occupancy on rental basis without loss of basic allowance for quarters.

Notwithstanding the provisions of any other law, members of the Army, Navy, Air Force, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service, with dependents, may occupy on a rental basis, without loss of basic allowance for quarters, inadequate quarters under the jurisdiction of any of the uniformed services, notwithstanding that such quarters may have been constructed or converted for assignment as public quarters. The net difference between the basic allowance for quarters and the fair rental value of such quarters shall be paid from otherwise available appropriations.

(b) Administration.

The provisions of this section shall be administered under regulations approved by the President.

(c) Designation as rental housing.

The Secretaries of the Army, Navy, and Air Force for the respective military departments, the Secretary of the Treasury for the Coast Guard when the Coast Guard is operating as a service in the Treasury Department, the Secretary of Commerce for the Coast and Geodetic Survey, and the Secretary of Health, Education and Welfare for the Public Health Service (hereafter referred to as the "Secretaries"), are each authorized, subject to standards established pursuant to subsection (b) of this section, to designate as rental housing such housing as he may determine to be inadequate as public quarters.

(d) Leasing of housing units.

The Secretaries are each further authorized, subject to standards established pursuant to subsection (b) of this section, to lease inadequate housing to personnel of any of the mentioned services for occupancy by them and their dependents. The housing facilities leased, as herein provided, shall not be required to have been constructed with funds derived from appropriations specifically made for the purpose of the construction of rental housing for personnel of the services mentioned.

(e) Alteration, improvement, or disposition of housing units.

All housing units determined pursuant to subsection (c) of this section to be inadequate shall, prior to July 1, 1961, either be altered or improved so as to qualify as

public quarters, or be demolished or otherwise disposed of.

(f) Housing financed with mortgages insured under title VIII of the National Housing Act.

This section shall have no application to any housing financed with mortgages insured under the provisions of title VIII of the National Housing Act as in effect prior to the enactment of the Housing Amendments of 1955. (Pub. L. 85-241, title IV, § 407, Aug. 30, 1957, 71 Stat. 556; Pub. L. 85-685, title V, § 516, Aug. 20, 1958, 72 Stat. 664.)

APPENDIX D.

Title 12, U.S. Code, § 1748.*

Subchapter VIII.—Armed Services Housing Mortgage Insurance

§ 1748. Definitions.

As used in this subchapter—

(a) The term "mortgage" means a first mortgage on real estate, in fee simple, or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable; or (2) under a lease for a period of not less than fifty years to run from the date the mortgage was executed; and the term "first mortgage" means such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate, under the laws of the State in which the real estate is located, together with the credit instruments, if any, secured thereby.

(b) The term "mortgagee" includes the original lender under a mortgage, and his successors and assigns approved by the Commissioner; and the term "mortgagor" includes the original borrower under a mortgage, his successors and assigns.

(c) The term "maturity date' means the date on which the mortgage indebtedness would be extinguished if paid in accordance with periodic payments provided for in the mortgage.

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*Title 12, U.S. Code, Sec. 1748, has also been amended from time to time. It would appear that the amendments are not material to the particular issue involved in this case.

(d) The term "housing accommodations" means housing designed for occupancy by military personnel and their dependents, assigned to duty at or near the military installation where such housing units are constructed.

(e) The term "personnel" shall include military and civilian personnel approved by the Secretary of Defense, or his designee, and the dependents of all such personnel.

(f) The term "military" includes Army, Navy, Marine Corps, Air Force, and Coast Guard.

(g) The term "State" includes the several States, and Alaska, Hawaii, Puerto Rico, the District of Columbia, Guam, the Virgin Islands, the Canal Zone and Midway Island. (June 27, 1934, ch. 847, title VIII, § 801, as added Aug. 8, 1949, ch. 403, § 1, 63 Stat. 570, and amended July 14, 1952, ch. 723, § 10 (a) (2), 66 Stat. 603; Aug. 11, 1955, ch. 783, title IV, § 401, 69 Stat. 646; Aug. 7, 1956, ch. 1029, title V, § 501, 70 Stat. 1109.)

§ 1748a. Armed Services Housing Mortgage Insurance Fund; expenses of operation.

The Military Housing Insurance Fund created by this section prior to August 11, 1955, shall on and after August 11, 1955, be known as the Armed Services Housing Mortgage Insurance Fund. General expenses of operation of the Federal Housing Administration under this subchapter (including operations with respect to mortgages insured or to be insured pursuant to this subchapter prior to August 11, 1955) may be charged to the Armed Services Housing Mortgage Insurance Fund. (June 27, 1934, ch. 847, title VIII, § 802, as added Aug. 8, 1949, ch. 403, § 1, 63 Stat. 570, and amended Aug. 11, 1955, ch. 783, title IV, § 401, 69 Stat. 647.)

§ 1748b. Insurance of mortgages.

(a) Aggregate amount of insurance; termination date.

In order to assist in relieving the acute shortage and urgent need for family housing which now exists at or in areas adjacent to military installations because of uncertainty as to the permanency of such installations and to increase the supply of necessary family housing accommodations for personnel at such installations, the Commissioner is authorized, upon application of the mortgagee to insure mortgages (including advances on such mortgages during construction) which are eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make commitments for so insuring such mortgages prior to the date of their execution or disbursement thereon: *Provided*, That the aggregate amount of principal obligations of all mortgages insured under this subchapter (except mortgages insured pursuant to the provisions of this subchapter in effect prior to August 11, 1955) shall not exceed $2,300,000,000: *And provided further*, That the limitation in section 1715h of this title shall not apply to this subchapter: *And provided further*, That no mortgage shall be insured under this subchapter after June 30, 1959, except pursuant to a commitment to insure issued before such date.

(b) Eligibility for insurance.

To be eligible for insurance under this subchapter a mortgage shall meet the following conditions:

(1) The mortgaged property shall be held by a mortgagor approved by the Commissioner. The Commissioner may, in his discretion, require such mortgagor to be regulated or restricted as to capital structure, and methods of operation. The Commissioner may make such contracts with, and acquire for not to

exceed $100 stock or interest in, any such mortgagor, as the Commissioner may deem necessary to render effective such restriction or regulation. Such stock or interest shall be paid for out of the Armed Services Housing Mortgage Insurance Fund, and shall be redeemed by the mortgagor at par upon the termination of all obligations of the Commissioner under the insurance.

(2) The mortgaged property shall be designed for use for residential purposes by personnel of the armed services and situated at or near a military installation, and the Secretary or his designee shall have certified that there is no intention, so far as can be reasonably be foreseen, to substantially curtail the personnel assigned or to be assigned to such installation, and (ii) with the approval of the Commissioner, shall have determined that adequate housing is not available for such personnel at reasonable rentals within reasonable commuting distance of the installation and that the mortgaged property will not, so far as can reasonably be foreseen, substantially curtail occupancy in existing housing covered by mortgages insured under this chapter. The housing accommodations shall comply with such standards and conditions as the Commissioner may prescribe to establish the acceptability of such property for mortgage insurance, except that the certification of the Secretary of Defense or his designee shall (for purposes of mortgage insurance under this subchapter) be conclusive evidence to the Commissioner of the existence of the need for such housing. However, if the Commissioner does not concur in the housing needs as certified by the Secretary, the Commissioner may require the Secretary to guarantee the Armed Services Housing Mortgage Insurance Fund against loss with respect to the mortgage covering such housing. The Commissioner shall report to the Committees on Banking and Currency of the Senate and the House of Representatives each instance in which he

has required the Secretary to guarantee the Armed Services Housing Mortgage Insurance Fund, with reasons therefor. There are authorized to be appropriated such sums as may be necessary to provide for payment to meet losses arising from such guaranty.

(3) The mortgage shall involve a principal obligation in an amount—

(A) not to exceed the amount which the Commissioner estimates will be the replacement cost of the property or project when the proposed improvements are completed (the cost of the property or project as such term is used in this paragraph may include the cost of the land, the physical improvements, and utilities within the boundaries of the property or project);

(B) not to exceed an average of $16,500 per family unit for such part of such property or project (including ranges, refrigerators, shades, screens, and fixtures) as may be attributable to dwelling use: *Provided*, That the replacement cost of the property or project as determined by the Commissioner, including the estimated value of any usable utilities within the boundaries of the property or project where owned by the United States and not provided for out of the proceeds of the mortgage, shall not exceed an average of $16,500 per family unit: *Provided further*, That should the financing of housing to be constructed pursuant to a single invitation for bids be accomplished by two or more mortgages, the principal obligation of any single mortgage may exceed an average of $16,500 per family unit if the sum of the principal obligations of all mortgages for such housing does not exceed an average of $16,500 per family unit; and

(C) not to exceed the bid of the eligible bidder with respect to the property or project under sec-

tion 1594 of Title 42. The mortgage shall provide for complete amortization by periodic payments within such terms as the Commissioner shall prescribe, have a maturity not to exceed twenty-five years, and shall bear interest (exclusive of premium charges for insurance) at not to exceed 4½ per centum per annum of the amount of the principal obligation outstanding at any time. The Commissioner may consent to the release of a part or parts of the mortgage upon such terms and conditions as he may prescribe and the mortgage may provide for such release.

(c) Premium charges.

The Commissioner is authorized to fix a premium charge for the insurance of mortgages under this subchapter but in the case of any mortgage such charge shall not be less than an amount equivalent to one-half of 1 per centum per annum nor more than an amount equivalent to 1½ per centum per annum of the amount of the principal obligation of the mortgage outstanding at any time, without taking into account delinquent payments or prepayments. Such premium charges shall be payable by the mortgagee, either in cash, or in debentures issued by the Commissioner under this subchapter at par plus accrued interest, in such manner as may be prescribed by the Commissioner: *Provided*, That the Commissioner may require the payment of one or more such premium charges at the time the mortgage is insured at such discount rate as he may prescribe not in excess of the interest rate specified in the mortgage. If the Commissioner finds, upon the presentation of a mortgage for insurance and the tender of the initial premium charge and such other charges as the Commissioner may require, that the mortgage complies with the provisions of this subchapter, such mortgage may be accepted for insurance

by endorsement or otherwise as the Commissioner may prescribe In the event that the principal obligation of any mortgage accepted for insurance under this subchapter is paid in full prior to the maturity date, the Commissioner is authorized to refund to the mortgagee for the account of the mortgagor all, or such portion as he shall determine to be equitable, of the current unearned premium charges theretofore paid. The Commissioner may reduce the payment of premiums provided for herein.

(d) Default by mortgagor; rights of mortgagee.

The failure of the mortgagor to make any payment due under or provided to be paid by the terms of a mortgage insured under this subchapter shall be considered a default under such mortgage; and, if such default continues for a period of thirty days, the mortgagee shall be entitled to receive the benefits of the insurance as hereinafter provided, upon assignment, transfer, and delivery to the Commissioner, within a period and in accordance with rules and regulations to be prescribed by the Commissioner of (1) all rights and interest arising under the mortgage so in default; (2) all claims of the mortgagee against the mortgagor or others, arising out of the mortgage transactions; (3) all policies of title or other insurance or surety bonds or other guaranties and any and all claims thereunder; (4) any balance of the mortgage loan not advanced to the mortgagor; (5) any cash or property held by the mortgagee, or to which it is entitled, as deposits made for the account of the mortgagor and which have not been applied in reduction of the principal of the mortgage indebtedness; and (6) all records, documents, books, papers, and accounts relating to the mortgage transaction. Upon such assignment, transfer, and delivery, the obligation of the mortgagee to pay

the premium charges for mortgage insurance shall cease, and the Commissioner shall, subject to the cash adjustment provided for in subsection (e) of this section, issue to the mortgagee debentures having a total face value equal to the value of the mortgage, and a certificate of claim as hereinafter provided. For the purposes of this subsection, the value of the mortgage shall be determined in accordance with rules and regulations prescribed by the Commissioner, by adding to the amount of the original principal obligation of the mortgage which was unpaid on the date of default, the amount the mortgagee may have paid for (A) taxes, special assessments, and water rates, which are liens prior to the mortgage; (B) insurance on the property; and (C) reasonable expenses for the completion and preservation of the property and any mortgage insurance premiums paid after default; less the sum of (i) any amount received on account of the mortgage after such date; and (ii) any net income received by the mortgagee from the property after such date.

(e) Debentures; issuance; form and denomination.

Debentures issued under this subchapter shall be in such form and denominations in multiples of $50, shall be subject to such terms and conditions, and shall include such provisions for redemption, if any, as may be prescribed by the Commissioner with the approval of the Secretary of the Treasury, and may be in coupon or registered form. Any difference between the value of the mortgage determined as herein provided and the aggregate face value of the debentures issued, not to exceed $50, shall be adjusted by the payment of cash by the Commissioner to the mortgagee from the Armed Services Housing Mortgage Insurance Fund.

(f) Same; execution; signature; negotiability; interest rate; tax exemption; guarantee.

Debentures issued under this subchapter shall be executed in the name of the Armed Services Housing Mortgage Insurance Fund as obligor, shall be signed by the Commissioner, by either his written or engraved signature, and shall be negotiable. All such debentures shall be dated as of the date of default as determined in accordance with subsection (d) of this section, and shall bear interest from such date at a rate established by the Commissioner pursuant to section 1715o of this title, payable semiannually on the 1st day of January and the 1st day of July of each year, and shall mature twenty years after the date thereof. Such debentures shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by any Territory, dependency, or possession of the United States or by the District of Columbia, or by any State, county, municipality, or local taxing authority. They shall be paid out of the Armed Services Housing Mortgage Insurance Fund, which shall be primarily liable therefor and they shall be fully and unconditionally guaranteed as to principal and interest by the United States, and such guaranty shall be expressed on the face of the debentures. In the event the Armed Services Housing Mortgage Insurance Fund fails to pay upon demand, when due, the principal of or interest on any debentures so guaranteed, the Secretary of the Treasury shall pay to the holders the amount thereof which is authorized to be appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such debentures.

(g) Claim certificates.

The certificate of claim issued by the Commissioner to any mortgagee in connection with the insurance of mortgages under this subchapter shall be for an amount determined in accordance with subsections (e) and (f) of section 1739 of this title, except that any amount remaining after the payment of the full amount under the certificate of claim shall be retained by the Commissioner and credited to the Armed Services Housing Mortgage Insurance Fund.

(h) Laws applicable.

The provisions of subsections (k) and (l) of section 1713 of this title shall be applicable to mortgages insured under this subchapter and to property acquired by the Commissioner hereunder, except that as applied to such mortgages and property (1) all references in such sections to the "Housing Fund" shall be construed to refer to the "Armed Services Housing Mortgage Insurance Fund", and (2) the reference in section 1713 (k) to "subsection (g)" shall be construed to refer to "subsection (d)" of this section.

(i) Commissioner's additional powers to insure certain mortgages.

The Commissioner shall also have power to insure under this subchapter or subchapter II of this chapter any mortgage executed in connection with the sale by him of any property acquired under this subchapter without regard to any limit as to eligibility, time or aggregate amount contained in this subchapter or subchapter II of this chapter.

(j) Conclusiveness and validity of insurance contract.

Any contract of insurance executed by the Commissioner under this subchapter shall be conclusive evidence of the eligibility of the mortgage for insurance and the validity of any contract of insurance so executed shall be incontestable in the hands of an approved mortgagee from the date of the execution of such contract, except for fraud or misrepresentation on the part of such approved mortgagee. (June 27, 1934, ch. 847, title VIII, § 803, as added Aug. 8, 1949, ch. 403, § 1, 63 Stat. 570, and amended Aug. 10, 1949, ch. 412, § 12 (a), 63 Stat. 591; Sept. 1, 1951, ch. 378, title VI, § 601 (a—c), 65 Stat. 312; June 30, 1953, ch. 170, § 10 (a)—(c), 67 Stat. 124; June 29, 1954, ch. 410, § 1 (2), 68 Stat. 320; Aug. 2, 1954, ch. 649, title I, §§ 112 (c), 128 (a), 130, 68 Stat. 593, 609; June 30, 1955, ch. 251, § 1 (2), 69 Stat. 225; Aug. 11, 1955, ch. 783, title IV, § 401, 69 Stat. 647; Aug. 7, 1956, ch. 1029, title V, §§ 502—506 (a), 70 Stat. 1109; July 12, 1957, Pub. L. 85-104, title I, § 108 (c), title V, §§ 501, 502, 71 Stat. 297, 303; Apr. 1, 1958, Pub. L. 85-364, § 3(b), 72 Stat. 73.)

§ 1748c. Disposition of moneys; use; purchase of bonds and debentures; credits and charges on Fund.

(a) Moneys in the Armed Services Housing Mortgage Insurance Fund not needed for current operations under this subchapter shall be deposited with the Treasurer of the United States to the credit of the Armed Services Housing Mortgage Insurance Fund, or invested in bonds or other obligations of, or in bonds or other obligations guaranteed as to principal and interest by, the United States. The Commissioner may, with the approval of the Secretary of the Treasury, purchase in the open market debentures issued under the provisions of this subchapter.

Such purchases shall be made at a price which will provide an investment yield of not less than the yield obtainable from other investments authorized by this section. Debentures so purchased shall be canceled and not reissued.

(b) Premium charges, adjusted premium charges, and appraisal and other fees, received on account of the insurance of any mortgage insured under this subchapter, the receipts derived from any such mortgage or claim assigned to the Commissioner and from any property acquired by the Commissioner, and all earnings on the assets of the Armed Services Housing Mortgage Insurance Fund, shall be credited to the Armed Services Housing Mortgage Insurance Fund. The principal of and interest paid and to be paid on debentures issued in exchange for any mortgage or property insured under this subchapter, cash adjustments, and expenses incurred in the handling of such mortgages or property and in the foreclosure and collection of mortgages and claims assigned to the Commissioner under this subchapter, shall be charged to the Armed Services Housing Mortgage Insurance Fund. (June 27, 1934, ch. 847, title VIII, § 804, as added Aug. 8, 1949, ch. 403, § 1, 63 Stat. 570, and amended Aug. 11, 1955, ch. 783, title IV, § 401, 69 Stat. 650.)

§ 1748d. Lease of property; terms and conditions.

Whenever the Secretary of the Army, Navy, or Air Force determines that it is necessary to lease any land held by the United States on or near a military installation to effectuate the purposes of this subchapter, he may lease such land upon such terms and conditions as will, in his opinion, best serve the national interest. The authority conferred by this section shall be in addition to and not in derogation of any other power or authority of

the Secretary of the Army, Navy, or Air Force. (June 27, 1934, ch. 847, title VIII, § 805, as added Aug. 8, 1949, ch. 403, § 1, 63 Stat. 570, and amended Aug. 11, 1955, ch. 783, title IV, § 401, 69 Stat. 651.)

§ 1748e. Mortgages on property in Alaska.

The second sentence of section 1715d of this title, as amended, relating to housing in the Territory of Alaska, shall not apply to mortgages insured under this subchapter on property in said Territory. (June 27, 1934, ch. 847, title VIII, § 806, as added Aug. 8, 1949, ch. 403, § 1, 63 Stat. 570, and amended Aug. 11, 1955, ch. 783, title IV, § 401, 69 Stat. 651.)

§ 1748f. Rules and regulations; Special Assistant for Armed Services Housing for Mortgage Insurance.

The Commissioner is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter. In the performance of, and with respect to, the functions, powers, and duties vested in him by this subchapter, the Commissioner, notwithstanding the provisions of any other law, shall appoint a Special Assistant for Armed Services Housing for Mortgage Insurance, and provide the Special Assistant with adequate staff, whose whole responsibility will be to expedite operations under this subchapter and to eliminate administrative obstacles to the full utilization of this subchapter under the direction and supervision of the Commissioner. (June 27, 1934, ch. 847, title VIII, § 807, as added Aug. 8, 1949, ch. 403, § 1, 63 Stat. 570, and amended Aug. 11, 1955, ch. 783, title IV, § 401, 69 Stat. 651.)

§ 1748g. Cost of certification.

The cost certification required under section 1715r of this title shall not be required with respect to mort-

gages insured under the provisions of this subchapter. (June 27, 1934, ch. 847, title VIII, § 808, as added Aug. 8, 1949, ch. 403, § 1, 63 Stat. 570, and amended Aug. 11, 1955, ch. 783, title IV, § 401, 69 Stat. 651.)

§ 1748h-1. Civilian employees of armed services.

(a) Requirements; certificate of need for housing and employment status.

Notwithstanding any other provisions of this subchapter and in addition to mortgages insured under section 1748b of this title, the Commissioner may insure any mortgage under this section which meets the eligibility requirements set forth in section 1709 (b) of this title: *Provided*, That a mortgage insured under this section shall have been executed by a mortgagor who at the time of insurance is the owner of the property and either occupies the property or certifies that his failure to do so is the result of a change in his employment by the Armed Forces or a contractor thereof and to whom the Secretary or his designee has issued a certificate indicating that such person requires housing and is at the date of the certificate a civilian employee at a research or development installation of one of the military departments of the United States or a contractor thereof and is considered by such military department to be an essential, nontemporary employee at such date. Such certificate shall be conclusive evidence to the Commissioner of the employment status of the mortgagor and of the mortgagor's need for housing.

(b) Certification of housing need to Commissioner; guaranty from loss; appropriations.

No mortgage shall be insured under this section unless the Secretary or his designee shall have certified to the Commissioner that the housing is necessary to pro-

vide adequate housing for such civilians employed in connection with such a research or development installation and that there is no present intention to substantially curtail the number of such civilian personnel assigned or to be assigned to such installation. Such certification shall be conclusive evidence to the Commissioner of the need for such housing but if the Commissioner determines that insurance of mortgages on such housing is not an acceptable risk, he may require the Secretary to guarantee the Armed Services Housing Mortgage Insurance Fund from loss with respect to mortgages insured pursuant to this section. There are authorized to be appropriated such sums as may be necessary to provide for payment to meet losses arising from such guaranty.

(c) Economic soundness of property.

The Commissioner may accept any mortgage for insurance under this section without regard to any requirement in any other section of this chapter, that the project or property be economically sound or an acceptable risk.

(d) Insurance benefits to which mortgagee entitled.

Any mortgagee under a mortgage insured under this section is entitled to the benefits of insurance as provided in section 1710 (a) of this title with respect to mortgages insured under section 1709 of this title.

(e) Payment of insurance; meaning of terms.

The provisions of subsections (b)—(h), and (j) of section 1710 of this title shall apply to mortgages insured under this section except that as applicable to those mortgages: (1) all references to the "Fund" or "Mutual Mortgage Insurance Fund" shall refer to the "Armed Services

Housing Mortgage Insurance Fund" and (2) all references to section 1709 of this title shall refer to this section.

(f) Provisions of subchapter applicable.

The provisions of sections 1748, 1748a, 1748b (c), 1748b (i), 1748b (j), 1748c (a), 1748c (b), and 1748f of this title and the provisions of section 1748b (a) of this title relating to the aggregate amount of all mortgages insured and the expiration date of the Commissioner's authority to insure under this subchapter, shall be applicable to mortgages insured under this section. (June 27, 1934, ch. 847, title VIII, § 809, as added June 13, 1956, ch. 381, 70 Stat. 273.)

§ 1748i. Appropriation for acquisition of land, installation of outside utilities, and site preparation.

There are authorized to be appropriated funds for acquisition of land, installation of outside utilities, and site preparation for housing projects to be constructed under this subchapter. Such funds may be expended by the respective military departments for housing projects when the Secretary of Defense, after consultation with the Federal Housing Commissioner, determines that such housing projects should be constructed and that such expenditures are essential to the construction of satisfactory housing. Such expenditures may not exceed an average of $1,500 per housing unit in respect of any housing project, and shall not exceed an average of $1,000 per housing unit in respect of all housing projects for which expenditures are approved under the provisions of this section. (Sept. 28, 1951, ch. 434, title V, § 505, 65 Stat. 365.)

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In the Supreme Court of the United States

No. 413

OCTOBER TERM, 1962

UNITED STATES OF AMERICA, for the Use and Benefit of MILES LUMBER COMPANY, a Corporation, and MILES LUMBER COMPANY, a Missouri Corporation, in Its Individual Capacity,
Petitioners,

vs.

HARRISON AND GRIMSHAW CONSTRUCTION COMPANY, a Partnership or Joint Venture; HARDY PLYWOOD AND DOOR, INC., a Corporation; TEXHOMA DISTRIBUTORS, INC., a Corporation; MARSHALL WHOLESALE LUMBER COMPANY, INC., a Corporation; CARL MORRIS, an Individual Doing Business As Carl Morris Construction Company; STANDARD ACCIDENT INSURANCE COMPANY, a Corporation; NATIONAL SURETY CORPORATION, a Corporation; AETNA CASUALTY & SURETY COMPANY, a Corporation; NEW AMSTERDAM CASUALTY COMPANY, a Corporation; THE TRAVELERS INDEMNITY COMPANY, a Corporation; PAUL W. ANDERSON; NATHAN A. BURKHAM; W. G. (Bud) KILLION; MARJORIE ANDERSON; FLORINE BURKHAM; BETTY ANN KILLION; and DANIEL E. HARDY,
Respondents.

SEPARATE RESPONSE TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

JOHN H. CANTRELL,
2120 First Natl. Bldg.,
Oklahoma City 2, Okla.,
F. PHILIP KIRWAN,
1000 City Natl. Bk. Bldg.,
Kansas City 6, Mo.,
REMINGTON ROGERS,
409 Oil Capital Bldg.,
Tulsa, Okla.,
Attorneys for Certain Named Respondents.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 413

UNITED STATES OF AMERICA, for the Use and Benefit of MILES LUMBER COMPANY, a corporation, and MILES LUMBER COMPANY, a Missouri Corporation, in Its Individual Capacity, *Petitioners*,

vs.

HARRISON AND GRIMSHAW CONSTRUCTION COMPANY, a partnership, or Joint Venture, *et al.*, *Respondents*.

SEPARATE RESPONSE TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

1. *Parties.* This response is made in behalf of the prime contractor on a Capehart Housing Project and four sureties upon the prime contractor's bond, and in behalf of the Travelers Indemnity Company, surety upon a subcontractor's bond, The Travelers Indemnity Company does not admit said bond has any validity.

2. *There Is No Genuine Conflict Among the Circuits.* The decision for which petitioner seeks certiorari is reported in 365 F. 2d 363 (10th Cir.). Petitioner (pp. 6-7) quotes from *Lasley* v. *U. S.*, 285 F. 2d 98 (5th Cir.) in support of its contention that there is a conflict among the circuits. In the *Lasley* case the issue was one of Federal Court jurisdiction. In the portion of the opinion quoted by counsel the court did find that the Miller Act would confer such jurisdiction in a suit on a Capehart Bond. It need not be contended that this part of the opinion is *obiter dictum*, but this part of the holding was certainly not necessary for the decision. The relative unimportance attached to the applicability of the Miller Act appears from the brief of the appellee in that case (Appendix A), and the further statement of the Court of Appeals for the Fifth Circuit, which follows the portion of the opinion quoted by petitioner as holding that the Miller Act would confer jurisdiction. The court said:

> "However, even assuming, arguendo, that this is not true, we find that the district court nevertheless had jurisdiction to entertain this suit under the concurrent jurisdiction conferred upon it by 28 U. S. C. A. Sec. 1352. For this reason, there is no merit in the arguments put forth by Appellants."

In our case, aside from venue questions, federal court jurisdiction is not involved. In alternative to Miller Act jurisdiction claimed in the first count, the second count of petitioner's amended complaint claims jurisdiction as against these respondents, on the ground of diversity of citizenship.

Petitioner cites also some district court decisions holding that the Miller Act applies. The Louisiana decision (*Autrey v. William, et al.*, 185 F. Supp. 802) is from the Fifth Circuit, and the scanty opinion throws little light on the question. The decision from the Maryland District Court (*United States, ex. rel. Acme Furnace Fitting Co. v. Ft. George G. Meade Defense Housing Corp.*, 186 F. Supp. 639) also involved the question of Federal Court jurisdiction. The soundness of the opinion might well be doubted from its remarkable conclusion that the claimant could proceed both in the state court with a lien foreclosure against a Capehart Project, and at the same time rely on the Miller Act. Again the court's own lack of conviction on the point appears from its further statement in the opinion. (loc. cit. 649)

> "However, even if this conclusion be incorrect, since it presently appears from the pleadings that diversity of citizenship and the requisite amount in controversy exist, the court will—if this be the case and the use-plaintiff so desires—entertain pursuant to section 1653 of Title 28 U. S. C. A. a motion by said plaintiff to amend its pleadings to allege formally jurisdiction, in addition, under Title 28 U. S. C. A. Sec. 1352 in order to permit a ruling on the merits."

The only other decision on which plaintiff relies is *U. S. v. Progressive Contractors, Inc.*, 196 Fed. Supp. 171. In that opinion, the North Dakota District Court held that action could be maintained on a Capehart bond without giving the notices therein required, if plaintiff

gave the notice required by the Miller Act. (Appendix "B") This decision was promptly reversed by the Court of Appeals for the 8th circuit. *Continental Casualty Co. v. United States for Use, etc.*, 305 F. 2d 795.[1]

The so-called "conflict" among the circuits is thus so narrowed as to seem more apparent than real. Holding that the Miller Act confers jurisdiction over an action on a Capehart bond is the District Court decision from Maryland, and the *Lasley* opinion from the Court of Appeals for the 5th Circuit. The rather scanty consideration given to the Miller Act in the *Lasley* case is quite understandable. The problem there was one of federal court jurisdiction. In both of these cases the same decision would follow whether the Miller Act applied or not.

In vivid contrast are the opinions of the Court of Appeals for the 8th and 10th Circuits. Independently of each other, but applying almost identical logic and reasoning, and indicating exhaustive research and full consideration of the problem, these courts held that the Miller Act does not apply to Capehart projects. These parallel decisions each contain a full discussion of the problem. In both, we find the same analysis, the same rationale, and the same end results. Both conclude that the Miller Act does not apply. In passing it might also be noted that District Courts in the 1st and 2nd Cir-

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1. We understand that application for certiorari has been made to this Court in this case.

cuits have reached the same conclusion." (Appendix "C") In these circumstances it may well be doubted that petitioner has presented any such genuine conflict among the circuits as would justify the issue of certiorari.

3. *The Question Is No Longer of Such Importance as to Justify the Issue of Certiorari.* If additional Capehart Projects were to be created, with possible repetitions of the same legal question, some substance might be found in petitioner's contentions in paragraphs 2 and 3 (pp. 8-9) that a final decision by this court construing the Capehart Act in conjunction with the Miller Act would be important. However, the United States Senate has recently held extensive hearings on the Capehart Act. We understand that the Congress has not authorized further Capehart construction, but, on the contrary, has authorized the expenditure of appropriated funds for direct government construction of housing on military installations. All such construction would, of course, be under the Miller Act. At this time the likelihood that the question involved herein will repeatedly arise would seem too doubtful to justify certiorari.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for the writ of certiorari should be denied.

Respectfully submitted,

JOHN H. CANTRELL,
2120 First Natl. Bldg.,
Oklahoma City 2, Okla.,

F. PHILIP KIRWAN,
1000 City Natl. Bk. Bldg.,
Kansas City 6, Mo.,

REMINGTON ROGERS,
409 Oil Capital Bldg.,
Tulsa, Okla.,

Attorneys for Named Respondents.

APPENDIX "A"

Quotations from brief of Appellee in *Lasley* v. *United States*, 285 F. 2d 98.

The *entire* argument of the Appellee in the *Lasley* case as to the applicability of the Miller Act was embraced in the following (after quoting the Act):

> "We submit this clearly indicates the Public character of a Capehart Project, and the intent of Congress when this law was enacted."

This brief paragraph was followed by substantial argument that the Capehart Bonds in the *Lasley* case "are within the purview of Sec. 1352 of Title 28 U.S.C." The Appellee concluded his argument with the following statement:

> "It is therefore respectfully submitted that the Court has jurisdiction not only under the Miller Act, but also under 28 U. S. C. 1352 and further that the suit lies under the terms of the bond sued upon, in the United States District Court in which the project is situated, which in this case is the Western District of Texas, El Paso Division."

Both the Appellee and the court in the *Lasley* case were concerned with jurisdiction of the Federal Court. Reliance was placed not only on the Miller Act, but also upon 28 U. S. C. 1352.

APPENDIX "B"

Excerpts from opinion in 10th Circuit, *United States for Use of Miles Lumber Company* v. *Harrison & Grimshaw Construction Company, et al.*, 305 F. 2d 363.

We are at loss to comprehend the footnote which appears on page 5 of the Petition for Certiorari. Plaintiff's amended complaint nowhere alleged the giving of the notices required by the Capehart Bond. We do not understand that in considering certiorari this court will pass on questions of specific facts or review evidence. However, if there be any doubt that the decision for which certiorari is asked involved the necessity of giving the notices required by the Capehart Bond, we excerpt the following from the opinion of the Court of Appeals:

> "If the Miller Act controls, the notice given prior to suit was sufficient whereas, if it does not, that notice was insufficient."
>
> . . . . . .
>
> "A prerequisite to suit on the bond is notice to any two of the following, 'the principal, any one of the Obligees, or the Sureties above named' before the expiration of 90 days after the performance of the last work or the supplying of the last material or before the expiration of the time for filing a lien under state law. The bond provides that 'either the giving of notice, or the filing of lien, in accordance with the pertinent lien law of the place where the project is located is a sufficient notice.' Miles did not give the notice required by the bond.
>
> . . . . . .

"Under the Miller Act notice of a claim by a supplier of labor or material to a subcontractor need be given only to the prime contractor. The bond before us requires notice to two of its parties."

The court concluded:

"The notice provisions of the bond govern. As these were not satisfied, Count 1 of the complaint states no claim and the judgment of dismissal was proper."

APPENDIX "C"

District Court decisions from 1st and 2nd Circuits holding that Miller Act does not apply:

As to the First Circuit, see *U. S. For General Acceptance v. Maguire Homes, Inc.*, 186 F. Supp. 659 (Mass.); *Octeau v. American Surety Co. of New York* and *Westinghouse Electric Supply Co., et al., v. Maguire Homes, et al.*, in the United States District Court for the District of Rhode Island, cases numbered 2419, 2449 and 2458.

From the Second Circuit, see unreported decisions of the United States District Court for the Northern District of New York in case No. 7969, *U. S. for the Use of Glens Falls Electric Supply Co., Inc., v. S. S. Silberblatt, Inc., et al.*, and case No. 7970, *U. S. for Use of Clinton Electric Supply Corp. v. S. S. Silberblatt, Inc., et al.*